



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Civil Appellate Jurisdiction)

Wednesday, the Thirteenth day of April Two Thousand Twenty Two

PRESENT

THE HON`BLE MRS.JUSTICE S.KANNAMMAL

CMP.NOS.11690 & 11691 OF 2021

IN AS.NO.144 OF 2009

1 P.JAYAPAL

[PETITIONERS IN BOTH THE PETITIONS]

2 J.PREMSUNDAR

Vs

T.IRUTHAYAVASAN

[RESPONDENT IN BOTH THE PETITIONS]

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to restore A.S.No.144 of 2009 dismissed for default on 08.03.2017. (in CMP.NO.11690 OF 2021) and;

(ii) To condone the delay of 1073 days in filing the application seeking to restore A.S.No.144 of 2009 dismissed for default on 08.03.2017 (in CMP.NO.11691 OF 2021).

Order : These petitions coming on this day for hearing upon perusing the petitions and the affidavits filed in support thereof and upon hearing the arguments of MR.SUVETHAN.S, Advocate for M/S.T.T.RAVICHANDRAN, Advocate for the petitioners in both the petitions and of MR.K.SELVARAJ, Advocate for the Respondent in both the petitions, the court made the following order:-

These Civil Miscellaneous Petitions are filed to condone the delay of 1073 days in filing the restoration petition and to restore the appeal in A.S.No.144 of 2009 which was dismissed for default on 08.03.2017.

2.The original suit in O.S.No.178 of 2004 has been filed by the respondent/plaintiff against the petitioners/defendants for recovery of a sum of Rs.5,43,600/- based on a promissory note. The trial Court decreed the suit in favour of the respondent on 30.04.2008. Aggrieved against the said Judgement and Decree of the trial Court, the petitioners, who are the defendants, had preferred an appeal in A.S.No.144 of 2009 before this Court. However, when the appeal was listed for hearing on 06.03.2017 and 08.03.2017, the counsel for the petitioners/appellants had not represented the case. Since there was no representation on behalf of the



appellants, the appeal was dismissed for default on 08.03.2017. Thereafter, the appellants/petitioners herein have filed the present petition to restore the appeal, along with a petition to condone the delay of 1073 days in filing the restoration petition.

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3.Mr.S.Suvethan appearing for Mr.T.T.Ravichandran, learned counsel for the petitioners, would submit that the appeal was filed in time i.e., on 22.01.2009 and the matter was posted finally in the weekly list in the year 2015. Subsequently, when the case was listed for hearing during the months of February and March 2017, the counsel for the petitioners took time for preparing arguments and hence, the matter was adjourned. It is further submitted that the counsel for the petitioners had filed a memo to the effect to inspect the records of the Courts below and inspected the same.

4.The learned counsel for the petitioners would further submit that, since the counsel who appeared for the petitioners suffered from severe pain in his lower limbs and was taking treatment in the month of February and March 2017, there was no appearance on behalf of the appellants and that the appeal was dismissed for default. The learned counsel relied on the judgment of the Hon'ble Supreme Court in **Collector Land Acquisition, Anantnag and another v. Mst. Katiji & Ors [1987 AIR 1353]** and submitted that refusal of condoning the delay would lead a meritorious appeal being thrown out at the very threshold and the Courts need not have a pedantic approach on technical grounds while considering a petition for condonation of delay. He further relied on the judgment of the Hon'ble Supreme Court in the case of **S.Ganesharaju (dead) through LRs & another v. Narasamma (dead) through LRs & Others [2013 (11) SCC 341]** and submitted that there is no presumption that delay in approaching the Court is deliberate and the matter has to be heard on merits rather than shutting the doors at the threshold. It is represented by Mr.S.Suvethan that, still, the counsel on record is taking treatment and hence, he prayed for allowing these two petitions.

5.Per contra, Mr.K.Selvaraj, learned counsel appearing for the respondent would vehemently contend that the suit was decreed on 30.04.2008 after an elaborate trial and since the petitioners did not obey the decree and pay the amount to respondent, E.P.No.75 of 2008 was filed. Since the petitioners filed A.S.No.144 of 2009 and obtained stay of decree, the Execution Proceedings was not proceeded further. The learned counsel would further contend that the counsel for the petitioners took several adjournments and that the counsel for the petitioners did not appear and argue even after getting last chance, therefore, this Court was pleased to dismiss the appeal on 08.03.2017. It is further submitted that the counsel for the petitioners, in fact, was regularly attending the Execution Proceedings and the petitioners are fully aware of the order of this Court, dated 08.03.2017. It is further contended that the allegation that the petitioners are not aware of the dismissal of the appeal for more than five years is absolutely false and there is no merit in their contention.



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6.The learned counsel for the respondent would further contend that the respondent is unable to enjoy the fruits of the decree for more than five years as the petitioners willfully failed to pay the decree amount till now and that he sought for dismissal of the petition.

7.I have heard Mr.S.Suvethan, learned counsel appearing for the petitioners and Mr.K.Selvaraj, learned counsel for the respondent and perused the materials on record.

8.It can be seen that the Judgment and Decree in O.S.No.178 of 2004 was passed on 30.04.2008. The appeal in A.S.No.144 of 2009 against the said decree and judgment, was filed in the year 2009 and at the time of admission, stay of decree was granted in the appeal on 23.01.2009.

9.The present petitions are filed for condonation of delay and for restoration of the appeal which was dismissed for default. It is well settled that, in a petition to condone delay or in a petition to restore, the Court has to test as to whether there is "**sufficient cause**" which prevented the party from filing the petition within the period of limitation or from appearing before the Court on the specific date of hearing, respectively.

10.The only cause which has been given by the petitioners for non-appearance before the Court is that, at the time when the matter was taken up for final hearing on 06.03.2017 and 08.03.2017, the counsel on record was taking treatment for vascular problem in his lower limbs including peripheral arteries in his legs which was causing pains in his lower legs, and hence, they could not be represented before the Court by their counsel on those days, and their counsel unfortunately missed to follow up the list also. The only other cause which has been projected by the petitioners for condonation of delay is that the petitioners came to know about the dismissal only when the bailiff came to execute the arrest warrant on 20.04.2021 and on enquiry on 21.04.2021, his counsel informed that the appeal was dismissed for non-prosecution; till such time, the petitioners were under the *bona fide* impression that the appeal was pending and their counsel would inform them about the status of the case and the 1st petitioner is suffering from heart blockage and blood sugar level fluctuations for about past six years, taking insulin thrice a day, hence, he was under rest for the past about five years.

11.The petitioners have taken the medical grounds as cause to support the present petitions. Though it is well settled that illness can be considered to be a good cause in petitions for condonation and restoration, the Hon'ble Supreme Court, in **Arjun Singh v. Mohindra Kumar & others [AIR 1964 SC 993]**, has observed that, "*the only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause".*" Therefore, it is clear that a "sufficient cause" deserves to be



proved to the satisfaction of the Court. The onus of the petitioners to prove the same. However, the petitioners have not taken any steps to prove the long-lasting illnesses for years together as alleged by them, by placing any medical records in support of these petitions.

12. Even assuming for the sake of arguments the illness to be true, it can be seen from the affidavit that only the 1st petitioner is suffering from illness, and it is always open to the 2nd petitioner, who is aged 45 years as on the date of petitions, to prosecute the case, and nothing prevented the 1st petitioner to instruct his son/2nd petitioner to be vigilant in prosecuting the case filed by them. However, that has not been done in this case.

13. In **University of Delhi v. Union of India and others [2019 SCC Online SC 1634]**, a Three-Judge Bench of the Hon'ble Supreme Court has held as follows :

"20. ... Even in such case the condonation of long delay should not be automatic since the accrued right or the adverse consequence to the Opposite Party is also to be kept in perspective. In that background while considering condonation of delay, the routine explanation would not be enough but it should be in the nature of indicating "sufficient cause" to justify the delay which will depend on the backdrop of each case and will have to be weighed carefully by the Courts based on the fact situation."

14. In **G. Jayaraman v. Devarajan [2007 (2) CTC 643]**, this Court has held as follows :

"16. ... The party claiming indulgence must prove that he has reasonable diligence in prosecuting the matter. This test for condoning the delay is not satisfied in this case. Liberal exercise of jurisdiction under Section 5 of the Act would cause prejudice to the plaintiff/deed holder, who has been pursuing the money suit for quite a long time. In condoning the delay, there is improper exercise of discretion and therefore, the impugned order cannot be sustained."

15. In **Basawaraj and others v. The Special Land Acquisition Officer [2013 (14) SCC 81]**, the Hon'ble Supreme Court, after referring to various decisions, has held that "In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay."

16. In **Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others [2013 (12) SCC 649]**, the Hon'ble Apex Court has extracted the ratio laid down in **Balwant Singh v. Jagdish Singh and others [2010 (8) SCC 685]** as follows :



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"12. ... The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. **If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.**"

17. Though it is trite that the Courts should show a liberal approach in the matter of condoning the delay, as held in *Collector Land Acquisition (supra)*, relied upon by the learned counsel for the petitioners, in the instant case on hand, the petitioners have not even shown any inclination to contact their counsel after filing the appeal, just pointing out to the illness of the 1st petitioner. In the present era of advanced communication, the litigants are not left with an only option to come down to the office of their counsel to know the stage of the case, but can very well get the same through transparent online platform like e-Courts, which was very much in existence at the time of dismissal of the appeal in the year 2017, or at least by contacting their counsel by a telephonic call. Therefore, the age-old routine reason of ignorance would be of no avail to the parties any further. Therefore, the contention of the appellant that he was not aware of the dismissal does not sound good, rather appears absurd. In any event, the least what is required out of a litigant is, diligence in following up his/her own litigation in the Courts. However, the same is completely lacking in the present case on hand. The same principle applies to the counsel also, who are duty-bound and responsible to follow-up the litigation of their clients and apprise them of the stage of case then and there.

18. Compared to petitions to set aside *ex parte* orders where the non-aggrieved party shirks away from litigation for having no say from his/her side, Courts will show higher degree of strictness in petitions to set aside orders of dismissal for default, where an aggrieved party who has approached the Court for justice for himself/herself, is not prepared/ready/willing/diligent to effectively prosecute his/her own case.



19. A right to appeal provided under the Statute is to protect the rights of the aggrieved party, however, the same cannot be used as a tool to delay the fruits of the decree to the decree holder, to ensure which, the law of limitation has been put in force. Courts, while exercising discretion to condone the delay, will frown upon the parties, who remain dormant for long years and suddenly, at the moment when the opposite party tries to taste the fruits of success, file one petition or other to delay the same.

20. In the present case on hand, it is true that the counsel for the appellant had filed a memo on 24.01.2014, requesting the pleadings set and typed set of papers from the Registry. However, thereafter, when the appeal was taken up for hearing in the year 2015, it is seen that the appeal has been adjourned on various occasions at the instance of the counsel for the appellant, and ultimately, when the appeal was posted for hearing on 13.02.2017, the counsel for the appellant sought an adjournment for undergoing a surgery and it was objected to by the counsel for the respondent, however, this Court adjourned the case to a specific date, i.e. on 06.03.2017. While so, when the counsel for the appellant was very well aware that the appeal was to be posted on 06.03.2017, he did not make any arrangement to at least represent him on 06.03.2017. However, on 06.03.2017, the appeal was once again adjourned to 08.03.2017, on which day also, there was no representation for the appellant. Therefore, this Court dismissed the appeal for default on 08.03.2017.

21. Even after the dismissal of the appeal for default on 08.03.2017, there was ample time for the appellant provided under the Statute to file a petition for restoration, however, neither the counsel was willing to follow-up the case after getting adjournment on 13.02.2017, nor the appellant right from the filing of the appeal itself. In ***G.P.Srivatsava v. Shri.R.K.Raizada and others [2000 (II) CTC 27]***, the Hon'ble Supreme Court has held that "In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional." However, even the restoration petition has not been filed in time, but after an inordinate delay of nearly three years, which shows the lackadaisical attitude of the petitioners in prosecuting the appeal, which cannot be entertained by this Court.

22. In the judgment relied upon by the learned counsel for the petitioners in the case of *S.Ganesharaju (supra)* itself, the Hon'ble Supreme Court has held that **"the only guiding principle to be seen is whether a party has acted with reasonable diligence and had not been negligent and callous in the prosecution of the matter."** However, in the instant case, as discussed above, the petitioners have not acted with reasonable diligence and have remained negligent in prosecuting the matter.



23. Therefore, for all the above reasons, this Court is not inclined to exercise its discretion in condoning the delay or in restoring the appeal which was dismissed for default. Accordingly, these Civil Miscellaneous Petitions are dismissed.

-sd/-

13/04/2022

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Sub-Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

THE ADDITIONAL DISTRICT JUDGE,
FAST TRACK COURT-II, SALEM.

Order

in
CMP.NOS.11690 & 11691 OF 2021

IN AS.NO.144 OF 2009

Date :13/04/2022

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